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In The

SUPREME COURT OF THE UNITED STATES

October Term 1966

No: 1083

CLIFFORD DELAIN DAVIS

Petitioner

VS.

STATE OF NORTH CAROLINA

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF NORTH CAROLINA

JOHN W. HINSDALE
Lawyers Building
Raleigh, North Carolina

E. REAMUEL TEMPLE
139 Market Street
Smithfield, North Carolina

Attorneys At Law For The Petitioner

SUBJECT INDEX

Opinion Below 2

Jurisdiction 2

Summary Statement 2

Raising of the Federal Question 3

Question Presented 3

Reasons Relied on for the Allowance of the Writ.. 6

Appendix of Opinion Below-
Petition Rehear and Order 6

Appendix of Statutes 10

TABLE OF AUTHORITIES

Overstreet Vs. U.S.A. 321 F.R. 2nd 459 (1963)
U.S. Ct. Appeals 5th Circuit 4

Reaves Vs. Henkel (NY) 1904 24 S. Ct. 605 4

Salinger Vs. U.S. 272 U.S. 542 4

Sterone Vs. U.S. (PA) 1960; 80 S. Ct. 270;
361 U.S. 212 4

State Vs. Hauf (DC); 47 F. Supp 832 4

United States Vs. Norris 281 U.S. 619 5

United States Constitution Amendment V and XIV .. 5

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

To: The Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States of America:

Petitioner, Clifford Delain Davis, respectfully prays for a writ of certiorari to the Supreme Court of North Carolina to review the final judgment of the Supreme Court of North Carolina and the order denying the petition to rehear of the Supreme Court of North Carolina.

JURISDICTION

The jurisdiction of the Court is invoked under the Act of June 25, 1948; 28 U. S. C. SECTION 1257 (3) in that the validity of North Carolina State Statutes 15-169 and 15-170 are repugnant to the United States Constitution:

OPINION BELOW

The petition to rehear was denied by the Supreme Court of North Carolina. The opinion of the Supreme Court of North Carolina and the Petition to rehear is contained in the Appendix.

SUMMARY STATEMENT

Petitioner was indicted in the Superior Court of Johnston County, State of North Carolina at the February 8, 1965 Criminal term as follows: The Jurors for the State upon their oath present: the Clifford Delain Davis in Johnston County on or before the 28th day of December, 1964 with force and arms at and in the County aforesaid did unlawfully willfully, and feloniously ravish and carnally know EUGENIA ELIZABETH UPCHURCH a female person by force and against her will against the form of the statute in such case made and provided and against the peace and dignity of the State. At the February 18, 1965 Criminal term of Johnston County Court, the defendant was tried under and pursuant to the bill of indictment and the jury returned a verdict of Guilty of "ASSAULT WITH INTENT TO COMMIT RAPE." Defendant was sentenced to prison for a term of not less than 12 and not more than 15 years in the State Prison. Defendant appealed. Supreme Court of North Carolina (Filed December 1, 1965) PER CURIAN, "NO ERROR". (Appendix P. 6). That subsequent thereto Petitioner filed a petition to rehear (Appendix 6) and that on the 2nd day of February, 1965 Justices R. HUNT PARKER AND JUSTICE CARYLE HIGGINS entered order: "CAREFULLY CONSIDERED, PETITION DENIED." That the bill of indictment returned at the February 8, 1965 term of Johnston

County Criminal Court contained but one charge, to wit: rape. That upon the trial of the cause the jury returned a verdict that the Defendant was guilty of the crime: "assault with the intent to commit rape." The verdict of the jury was inconsistent with the charge made in the bill of indictment.

RAISING OF THE FEDERAL QUESTION

The Federal questions sought to be reviewed, to wit: whether the petitioner was deprived of his liberty without due process of law in violation of the FOURTEENTH AMENDMENT AND FIFTH AMENDMENT to the Constitution of the United States of America. That the petitioner was sentenced to prison on the verdict of a jury which reads "guilty of assault with intent to commit rape" wherein he was tried upon a bill of indictment which charged "rape". Sentence was imposed pursuant to and under the provisions of N.C.G.S. 15-169 and N.C.G.S. 15-170. That there was no evidence to support the verdict of the jury and that N.C.G.S. 15-169 and N.C.G.S. 15-170 violates the provisions of U.S. Constitution AMENDMENTS V AND AMENDMENT XIV.

QUESTION PRESENTED

Was the Petitioner denied and deprived of his United States Constitutional rights guaranteed to him under and pursuant to the provisions of Amendment V and Amendment XIV of the United States Constitution and are the provisions of North Carolina General Statutes 15-169 and N.C.G.S. 15-170 in violation of AMENDMENT V AND AMENDMENT XIV of the United States Constitution in that part it permits a jury to find a defendant guilty of a crime for which he is and was not charged and for which there was no evidence. Petitioner was either guilty of rape or he was not.

REASONS RELIEF ON FOR ALLOWANCE OF THE WRIT

The instant case falls within the constitutional

provisions of AMENDMENT V AND AMENDMENT XIV of the United States Constitution "NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL OR OTHERWISE INFAMOUS CRIME UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY". Petitioner respectfully contends that the following authorities sustain his contention that he should not have been found guilty of a crime for which he was not charged and found by a grand jury. In the case of REAVES VS. HENKEL (NY) 1904 24 S. CT. 605; the Court stated "While many states in the exercise of their undoubted sovereignty have provided for trials of criminal offenses upon information filed by the prosecuting attorney and without any previous inquiry or action by a grand jury. The National Constitutional in its solicitude for the protection of individuals requires an indictment as a pre-requisite to a trial."

Further, in the case of STATE VS. HAUP (DC) 47 F Supp 834 the Court observed: " To meet the requirements of this amendment (referring to amendment V) an indictment must not only be sufficient to inform the accused that he is charged with a criminal offense but must also sufficiently specific to clearly inform the accused of what he has to meet and this afford him a fair and reasonable opportunity to prepare for his defense."

Petitioner, further argues and contends that there was no evidence to sustain the verdict of the jury. That in the case of STEROF VS. UNITED STATES (PA) 1960 80 S. CT. 270; 361 U.S. 212 the Court stated: "Variance between pleading and proof which destroys a defendant's substantial right to be tried only on a charge presented in indictment returned by a grand jury is too serious to be treated as nothing more than a variance and dismissed as harmless error.

In the case of TILLMAN OVERSTREET VS. UNITED STATES OF AMERICA 321 F.R. 2nd 459 (1963) U.S. COURT OF APPEALS 5th Circuit LUMBARD, C.J. the Court held: "If two substantive offenses are named in the same

count of an indictment there is duplicity. That an indictment may not be amended except by re-submission to the grand jury. That it is clear that an indictment may not be amended except by re-submission to the Grand Jury, (RUSSELL VS. UNITED STATES 369 U. S. 769) The Supreme Court has held that withdrawal part of a charge from the consideration of the jury does not work an amendment of the indictment (Salinger vs. United States 272 U. S. 542) provided there is nothing added to the indictment (SEE UNITED STATES VS. NORRIS 281 U. S. 619) In the present case the bill of indictment charge the crime of rape, the verdict of the jury was "assault with the intent to commit rape." That the petitioner was not charged in the bill of indictment of "assault with intent to commit rape." That there was not evidence to warrant the verdict of the jury and that the verdict of the jury was not consistent with the bill of indictment.

Applying the principles of law stated herein to the circumstance and evidence presented in this cause the appellant submits that the verdict of the jury and the judgement of the court imposing a prison sentence of from twelve to fifteen years in prison should be declared null and void for that same violates the rights as guaranteed to petitioner under and pursuant to AMENDMENT V AND AMENDMENT XIV of the United States Constitution. That the provisions of North Carolina General Statutes 15-169 and 15-170 violates the provisions of AMENDMENT V AND AMENDMENT XIV of the United States Constitution and should be declared unconstitutional.

Respectfully submitted

Dated at Raleigh,
North Carolina
February 26, 1966

John W. Hinsdale, Chief Counsel
Raleigh, North Carolina

E. Reamuel Temple, Associate
Counsel
Smithfield, North Carolina

APPENDIX

STATE OF NORTH CAROLINA VS. CLIFFORD DELAIN DAVIS

Appeal by defendant from Bickett, J., February 15, 1965, Criminal Session of Johnston.

Criminal action in which the indictment charges that defendant, Clifford Delain Davis, on "The 28th day of December, 1964 . . . did, unlawfully, willfully and feloniously ravish and carnally know Eugenia Elizabeth Upchurch a female, by force and against her will . . . ."

Defendant entered a plea of not guilty. The State's evidence, in brief summary, tends to establish these facts: About 8:35 P. M. on 28 December 1964 prosecutrix, age 19, entered her car which was parked across the street from the public library in Smithfield. As she started her car, defendant (age 24, a married man) opened the right front door and jumped in. He held an open knife at her throat and caused her to drive to a secluded spot about two miles east of Smithfield. By means of force and threats he had two acts of sexual intercourse with her. On the way back to Smithfield defendant asked prosecutrix if she knew who he was. For fear he might kill her she told him she did not. She had known who he was for six or seven years, but had never associated, or had any conversation, with him. He got out of the car in a residential section of Smithfield. Prosecutrix went to her home and promptly reported that she had been raped.

Defendant testified that he had known prosecutrix for sometime, he rode with her on this occasion and had the acts of intercourse with her, she offered no objection or resistance.

The jury returned a verdict of "guilty of an assault with intent to commit rape." The court sentenced defendant to prison for a term of not less than 12 nor more than 15 years.

ATTORNEY GENERAL BRUTON AND STAFF ATTORNEY VANORE FOR THE STATE.

KNOX V. JENKINS, JR. FOR DEFENDANT.

Per Curiam. Defendant contends that he is entitled to a new trial by reason of the admission of irrelevant and prejudicial evidence, and error in the charge.

(1) An agent of the State Bureau of Investigation was permitted to testify, over defendant's objection, that he saw defendant immediately in front of prosecutrix' home about 12:30 A. M. on the night in question and defendant was then "intoxicated to the extent he was staggering on the street." Defendant contends that the testimony with respect to intoxication is irrelevant and without purpose other than to prejudice the jury against him, and further, is incompetent as proof of an unrelated criminal offense when defendant did not put his character at issue.

The following general principles are pertinent. Testimony of the condition of one accused of rape or assault with intent to commit rape, as to drinking or intoxication, at the time of the crime is admissible as a part of the res gestae. 75 C.J.S., Rape, s. 59, p. 531. ". . . in a prosecution for assault with intent to rape it has been held proper to show that accused was drinking before or about the time of the alleged offense, to show his condition at the time of the offense, to show a condition of mind which might render him reckless of consequences, or to corroborate the testimony of prosecutrix that she had detected the odor of liquor on her assailant." ibid, p. 532. But evidence that accused was drunk several hours after the time of the alleged offense is properly excluded. Pusley vs. State, 210 P. 306 (Okla.) See also Raynor vs. Railroad, 129 NC 195, 39 SE 821. Where intoxication is an issue at the trial, the question whether the existence of intoxication at a particular time is competent to show the existence of that condition at another time is a question of materiality or remoteness to be determined upon the facts of each particular case, including the length of time intervening and the

showing, if any, whether the condition remained unchanged. State vs. Kelly, 227 NC 62, 40 SE 2d 454; State vs. Dawson, 228 NC 85, 44 SE 2d 527.

In order to determine the relevance and competency of the testimony in question, it must be considered in relation to other evidence on the subject and to the conduct of defendant. Defendant testified that before the alleged crime he was at the Riverside Tavern drinking beer and he remained there at least an hour. Prosecutrix testified that at the time of the crime defendant did not "act like a drunk person" but when he got in the car she smelled alcohol on his breath. Defendant testified that after the occurrence he returned to the tavern and remained there until 11:00 P. M., that sometime thereafter he was passing the home of prosecutrix, saw seven or eight police cars parked on both sides of the street and a "lot of people on the lawn," and he stopped and walked up the street toward the house and was asked by an officer what he wanted. An officer testified that on this occasion defendant "was staggering on the street" (this is the testimony objected to). Defendant explained his condition at that time thus: "I had some beer in me. I did have enough alcohol in me so that it didn't matter how cold it was at that time. I was not in a staggering condition at that time."

The testimony that defendant was staggering on the street in front of the home of prosecutrix about 12:30, three and one-half hours after the alleged crime, has no tendency to prove that defendant was intoxicated at the time of the alleged crime, and is not competent for such purpose. Indeed, the State does not contend that defendant was drunk at the time of the offense. Yet, in our opinion the testimony is not irrelevant or incompetent. That defendant appeared at the home of prosecutrix after she had reported the assault and during the early stages of investigation, when officers and citizens had there assembled, has significance. If defendant was sober and in normal condition, his appear-

ance at that time and place was a circumstance strongly suggesting innocence. Defendant could contend, with much force, that a guilty person, in full possession of his faculties, does not ordinarily put himself in a position to be readily identified as the assailant and to be readily apprehended. On the other hand, if he was intoxicated and in a staggering condition he would probably be in a state of mind reckless of consequences and conducive of abnormal and unusual conduct. Thus, his condition on the occasion, if one of intoxication, would tend to weaken the inference of innocence which might otherwise arise. Therefore, the testimony is competent as bearing upon his mental state and motive in appearing at the home of prosecutrix.

"It is not required that evidence bear directly on the question in issue, but it is competent if it shows circumstances surrounding the parties necessary to an understanding of their conduct and motives and the reasonableness of their contentions." 2 Strong: N. C. Index, Evidence, s. 15. "When evidence is material and competent, objection on the ground that it would tend to discredit a party in the eyes of the jury, is untenable." ibid, If, as defendant contends, evidence of drinking and intoxication strongly prejudiced him in the eyes of the jury, the challenged testimony added very little to the picture otherwide developed by the evidence on this point.

(2) The court instructed the jury that they might return one of the following verdicts: guilty of rape, guilty of rape with recommendation of life imprisonment, guilty of assault with intent to commit rape, guilty of assault with a deadly weapon, guilty of assault on a female (defendant being a male person over the age of 18 years), or not guilty. In explaining to the jury the elements of an assault with intent to commit rape, the court defined "assault" as "an unlawful intentional offer or attempt by force or violence to do injury,

that is, bodily harm or hurt, to the person of another, and it must be intentional." Thereafter, in explaining the law with respect to an assault with a deadly weapon, the judge said: "The court will not again define what is meant by assault because the same definition applies here as in the other except that this is with a deadly weapon." And in explaining assault on a female the court said: "the same definition of assault that I have heretofore given you applies in this case, on this count."

Defendant does not contend that the definition given is erroneous, but insists that the failure to repeat the definition in explaining the lesser grades of the offense charged confused the jury and could have led them to the conclusion that all of the elements of assault with intent to commit rape were embraced in assault with a deadly weapon and assault on a female.

Defendant's contention is not sustained. We can not say as a matter of law that the jury were, or might have been, confused by instructions which are clear, simple and unambiguous. There is no requirement of law that a trial judge must repeat a definition each time the word or term (once defined) is repeated in the charge. State vs. Young, 286 SW 29 (Mo.). See also State vs. Tyndall, 230 NC 174, 52 SE 2d 272; State vs. Killian, 173NC 792, 92 SE 499.

N.C.G.S. 14-21 PUNISHMENT FOR RAPE

Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State prison and the court shall so instruct the jury.

15-169

N.C.G.S. CONVICTION OF ASSAULT, WHEN INCLUDED IN CHARGE

On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such findings; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character.

N.C.G.S. 15-170 CONVICTION FOR A LESS DEGREE OR AN ATTEMPT

Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit a less degree of the same crime.

U. S. CONSTITUTION AMENDMENT XIV SECTION I

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. CONSTITUTION AMENDMENT V:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in the time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without

due process of law; nor shall private property be taken for public use without just compensation.

PETITION FOR A REHEARING

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA: GREETINGS

NOW comes the Petitioner and Defendant, CLIFFORD DELAIN DAVIS, and respectfully makes a motion for a rehearing in this cause and doth show unto the Court:

I

That your Petitioner was tried at the February 1965 criminal session of the Johnston County Superior Court upon an indictment of rape. That after a jury of twelve had been selected and the evidence presented in this cause the jury returned a verdict of guilty of an "assault upon a female with intent to commit rape", and that the Court imposed a judgement that the said Clifford Delain Davis be imprisoned for a term of not less than twelve and not more than fifteen years in prison. From the foregoing judgment imposed in this cause the petitioner, Clifford Delain Davis, appealed to the North Carolina Supreme Court within the time allowed by law and that after the proper briefs had been filed the cause came on for hearing and was heard by the Honorable North Carolina Supreme Court and that within a short period of time after arguments were made in the cause the North Carolina Supreme Court rendered and entered its decision that the action of the court below be affirmed and up-held.

II

That in accordance with the provisions of Supreme Court Rule 44, there is attached hereto certificates signed by two practitioners of this Court setting forth in substance that the Supreme Court of North Carolina erred in failing and refusing to enforce the legal and Constitutional rights of the Petitioner, Clifford Delain Davis.

III

That this petition for a rehearing is being made under and pursuant to the provisions of Rule of Practice No. 44 of North Carolina Supreme Court and that same is being made within forth days from the date that the decision of the North Carolina Supreme Court was filed in this cause.

IV

That the defendant Clifford Delain Davis respectfully showth by affidavits attached hereto that there were irregular procedures had and conducted before the Grand Jury of Johnston County, North Carolina, which returned a true bill charging the defendant with rape, and that such irregular procedures were in violation of the North Carolina Constitution Article I Sections, 5, 11, 12, 13, and 17 and AMENDMENTS V AND XIV of the United States Constitution.

V

That your petitioner, Clifford Delain Davis, further shows this Honorable Court thathe was INDICTED FOR THE CRIME OF RAPE and the jury returned a verdict of "assault upon a female with the intent to commit rape". That the only evidence presented at the trial was that of the prosecuting witness, who testified that she had been twice raped and the testimony of the defendant that she willingly consented. There is not a scintilla of evidence that there was an attempt on the part of the defendant. He was guilty of rape or he was innocent of the charge. The charge of His Honor in the Court below, on this point, was erroneous and unwarranted. There must be some evidence of the lesser offense to justify such a charge. We also contend that Sections 5, 11, 12, 13, and 17 of the Constitution of North Carolina and Amendments to the Constitution of the United States V and XIV are in point for the reason that the verdict of the jury has no foundation upon which to rest. We respectfully call the attention of the Court to the following cases:

In the case of STATE VS. CHILDRESS, 228 N. C. 208, it was held: Where there is evidence of a defendant's guilt of a lesser degree of the crime included in the bill of indictment, defendant is entitled to have the question submitted to the jury.

In the case of STATE VS. SPAIN, 201 N. C. 571, it was held: The principle upon which a defendant may be convicted of a lesser degree of the same crime charged in the bill of indictment applies only where there is evidence of guilt of the less degree, and where burglary in the first and second degree is charged in the indictment, and the question as to guilt on the first count is withdrawn, and the evidence does not support the charge of second degree burglary, the defendant cannot be convicted of the lesser offense.

In the case of STATE VS. SMITH, 201 N. C. 494, it was held: The provision of this section in regard to conviction of a less degree of the crime charged in the bill of indictment applies only where there is some evidence that a less degree of the crime had been committed, and where the State's uncontradicted evidence is to the effect that the crime of rape had been committed and the defendant relies solely upon an alibi, the refusal of the court to charge upon the lesser degrees of the crime or of an attempt is not error.

In the case of STATE VS. COX, 201 N. C. 357, it was held: Where all the evidence at the trial of a criminal action, if believed by the jury, tends to show that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to show the commission of a crime of less degree, it is not error for the court to fail to instruct the jury that they may acquit the defendant of the crime charged in the indictment and convict him of a crime of a less degree.

In the case of STATE VS. JORDAN, 226, N. C. 155, it was held: A defendant may be convicted of a

less degree of the crime charged, or for which he is being tried, when there is evidence to support the milder verdict.

In the case of STATE VS. BROWN 227 N. C. 383 it was held: Where all the evidence tends to show that the defendant ravished prosecutrix by force and against her will, defendant's sole defense being insanity, the trial Court properly limits the jury to a verdict of rape or not guilty, and the refusal of defendant's request to submit the question of defendant's guilt of lesser offense is without error.

In delivering the opinion of the Court Denny J. concludes his opinion with the following: The ruling of the Court below in declining the requested instruction must be upheld. Such ruling is in accord with the decisions of the Court, when all the evidence tends to show the defendant is guilty of the more serious charge in the bill of indictment, citing the following cases:

State vs. Radcliff 199 N. C. 9
State vs. Jackson 199 N. C. 321
State vs. Satterfield 207 N. C. 118
State vs. Hairston 222 N. C. 455
State vs. Sawyer 224 N. C. 61 Syl. 5.

In delivering the opinion of the Court in the case of STATE VS. JORDAN 226 N. C. 155, Stacy C. J. says: It is permissible under our practice to convict a defendant of the less degree of the crime charged, G. S. 15-170 or for which he is being tried, when there is evidence to support the milder degree. Citing STATE VS. SMITH 201 N. C. 494.

VI

That the Petitioner further showth unto this Honorable Court that he was sentenced to prison for a term of not less than twelve years and not more than fifteen years upon the verdict of a jury which found petitioner guilty of a crime for which the Grand Jury of Johnston County had not

returned a true bill, to wit "an attempt to commit rape" and that such was in violation of the rights of Petitioner as guaranteed under the terms of the State Constitution and Federal Constitution as set forth in Paragraphs IV and V thereof and contrary to decisions of this Court.

VII

That the provisions of North Carolina General Statutes 15-160 and 15-170 are in contravention of and contrary to the rights and liberties of the Petitioner as guaranteed to him under the State and Federal Constitution insofar as said General Statutes authorize the finding of a lesser degree of the crime charged where there is no evidence tending to show such lesser charge.

VIII

We are advertant to the ruling of this Honorable Court that it will not consider a rehearing in a criminal case based upon newly discovered evidence, however, the question before the Court in the instant case is entirely different from a hearing so based.

We contend that in view of the fact that the only charge contained in the bill of indictment was rape, and the further fact that there was no evidence presented by the State on the question of attempted rape and the jury having based its verdict upon an erroneous charge of the court, the case against the defendant should be dismissed.

We earnestly contend that where a defendant has been patently sentenced by an illegal judgment resulting in a long term of imprisonment and the loss of his good name forever that he should not be made dependent upon the clemency of the pardoning power.

IX

That the evidence presented in this cause presents but one question: "Was the defendant and petit-

ioner guilty of rape or was he not guilty?" That there can be no compromise in this case in the light of the decisions of this Court, that the verdict of the jury ought not to be permitted to prevail all of which is in contravention to the rights and liberties of the petitioner, Clifford Delain Davis.

X

That the proceedings conducted in this cause is contrary to the law of the land and that the petitioner, by and through his attorneys at law stand ready to present to the Honorable Court a legal brief, if it be the pleasure of the Honorable Court, to substantiate the alleged contentions presented herewith.

WHEREFORE: Petitioner, Clifford Delain Davis, doth petition the Court that the Honorable Justices to whom this petition is directed, and each of them, that they order, decree and adjudged that this cause be re-set for a hearing before the Supreme Court of North Carolina and for such other and further relief that the said petitioner may be entitled to by reason of the premises.

E. REAMUEL TEMPLE, JR.
Attorney at law for Petitioner

JOHN W. HINSDALE
Attorney at law for Petitioner

ORDER DENYING PETITION TO REHEAR

"Carefully considered and denied. This 2 February 1966."

R. Hunt Parker
Associate Justice

Carlisle W. Higgins
Associate Justice

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STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF THE RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

T. W. BRUTON,
Attorney General of North Carolina

THEODORE C. BROWN, JR.
Staff Attorney

Justice Building
Raleigh, North Carolina

Counsel for the State of
North Carolina, Respondent.

INDEX

Opinion 1

Jurisdiction 1

Question Presented 2

Constitutional Provisions & Statutes Involved 2

Respondent's Statement of the Case 3

Argument 4

TABLE OF THE CASES

STEROF v. UNITED STATES, 361 US 212, 80 S. Ct. 270, 4 L. ed. 2d 252 6

STATE v. HAUP, 47 F. Supp. 834 6

STATE v. DAVIS, 265 NC 720 1

STATE v. ROY, 233 NC 558, 64 SE 2d 840 5

STATE v. MOORE, 227 NC 236, 42 SE 2d 84 5

STATE v. GAY, 224 NC 141, 29 SE 2d 458 5

STATE v. JONES, 222 NC 37, 21 SE 2d 812 5

STATE v. HIGH, 215 NC 244, 1 SE 2d 563 5

STATE v. WILLIAM, 185 NC 685, 116 SE 736 5

STATE v. HILL, 181 NC 558, 107 SE 140 5

STATE v. BENTLEY, 223 NC 563, 27 SE 2d 738 5

STATE v. HARVEY, 228 NC 62, 44 SE 2d 472 5

STATE v. MATTHEWS, 231 NC 617, 58 SE 2d 625 5

STATE v. BRICKHEAD, 256 NC 494, 124 SE 2d 838 5

STATE v. GREEN, 246 NC 717, 100 SE 2d 52 5

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment 1

Fourteenth Amendment 1

Federal Statutes: 28 U.S.C. 1257 (3) 1

State Statutes: Sec. 15-169 of General Statutes of North Carolina 2

Sec. 15-170 of General Statutes of North Carolina 3

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OPINION BELOW

The Opinion of the Supreme Court of North Carolina is reported as STATE v. DAVIS, 265 NC 720 (Advance Sheets —No. 5—issued the 10th of December, 1965). The Opinion of the Supreme Court of North Carolina is also set forth in the petitioner's appendix at p. 6.

The Judgment of the Trial Court, which is a court of general jurisdiction, is not reported in any official publication. It can be found in the State Record certified to this court by the petitioner.

JURISDICTION

The petitioner invoked the jurisdiction of this court under the provisions of 28 U.S.C. 1257, (3), alleging a violation of constitutional rights secured by the Fifth and Fourteenth

Amendments. The Respondent, State of North Carolina, denies the petitioner has shown sufficient basis for this court to exercise its jurisdiction.

QUESTION PRESENTED

WERE THE PETITIONER'S CONSTITUTIONAL RIGHTS VIOLATED IN THAT HE WAS INDICTED FOR THE CAPITAL CRIME OF RAPE, BUT WAS FOUND GUILTY BY A JURY OF ASSAULT WITH INTENT TO COMMIT RAPE WHICH IS ALLOWED IN NORTH CAROLINA BY NORTH CAROLINA GENERAL STATUTE 15-169 AND 15-170?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The petitioner relies upon Section 1 of the Fourteenth Amendment and the Fifth Amendment of the Constitution of the United States.

Petitioner also attacks Sections 15-169 and 15-170 of the General Statutes of North Carolina, which read in the following manner:

N.C.G.S. 15-169 — "CONVICTION OF ASSAULT, WHEN INCLUDED IN CHARGE. On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and define a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character."

N.C.G.S. 15-170 — "CONVICTION FOR A LESS DEGREE OR AN ATTEMPT. Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

STATEMENT OF THE CASE

In this Brief, the Respondent will refer to the State Record certified to this court by the Clerk of the Supreme Court of North Carolina by the designation of "S.R.".

On the 28th of December, 1964 about 6:20 or about 6:25, the victim in this case, Eugenia Elizabeth Upchurch left her home, went to the home of Mrs. John W. Wells on Riverside Drive to a supper she was having for her son and girlfriend visiting there from out-of-state. Miss Upchurch left the supper shortly after the meal, due to the fact that she was working on a term paper and had to go to the library before it closed. She left the Wells' home between 8:15 and 8:20 and went straight to the library about three blocks from the Wells' home. She was driving a 1959 black Oldsmobile and parked directly in front of the Credit Production Place across from the library. She got out and went into the library and told the librarian the information she wanted for the term paper. She found where she could obtain the material and told the librarian she would come back in the morning for it. She left the library about twenty-five or twenty minutes before nine o'clock and walked out of the library and went straight to her car. She observed a boy or a man going in the same direction that she was; he was walking in the middle of the street toward the alley of the Credit Production Place. The main thing she noticed about him was that he was wearing a light beige sweater like the type she had given her brother not long ago. She got in the car and the next thing she knew, someone had opened the door and jumped in the car from the right hand side. The person had the

sweater pulled up over his face and he jumped on top of her and told her to drive. She argued with him for a while and he persisted in his order that she drive. She tried to push him off because she thought he was joking. She had her left hand free so she opened the door and yelled for help to the people she recognized that were passing in another car. After that, he jerked her back in the car and put a knife to her throat and told her not make that mistake again. Holding a knife at her throat he gave her directions to drive to a secluded spot where he forced the victim to have two acts of sexual intercourse with him in the front seat of the car. Upon completion of these acts, he gave the victim directions back to town where she let him out. She then immediately proceeded home and upon reaching there, went into her home and told her parents what had happened. A little later in the evening she told the police that the person who raped her was the petitioner.

The petitioner was indicted upon a bill of indictment charging him with rape of Eugenia Elizabeth Upchurch. The Solicitor put the defendant on trial for the capital crime of rape at the February 15, 1965 Term of the Criminal Superior Court of Johnston County. The defendant pled not guilty. Thereupon the State introduced evidence and the defendant introduced evidence. The jury returned a verdict of guilty of assault with the intent to commit rape. The petitioner moved to set the verdict aside. Motion was denied and the petitioner excepted. The court pronounced Judgment against the defendant, that he be imprisoned in the State's Prison for a term of not less than twelve nor more than fifteen years. Defendant, Clifford Delain Davis objected to the Judgment and excepted thereto and appealed forma pauperis to the Supreme Court of North Carolina.

ARGUMENT

Petitioner contends that he was denied due process of law because he, "was found guilty of a crime of which he was not charged or found by a Grand Jury."

The indictment in the instant case reads, "The jurists for

the State upon their oath present: that Clifford Delain Davis of Johnston County on or before the 28th day of December, 1964 with force and arms and at and in the county aforesaid did unlawfully, willfully, and feloniously ravish and carnally know Eugenia Elizabeth Upchurch a female by force and against her will and against the form of the statute in such case made and provided and against the peace and dignity of the State;" clearly charging the crime of rape in North Carolina.

In STATE v. ROY, 233 NC 558, 64 SE 2d 840 (1951) the Supreme Court of North Carolina ruled on the exact question of the petitioner. In the ROY case, supra, the defendant contended that since all the evidence pointed toward the crime of rape, and the State not having asked for a conviction of that crime, his motion for non-suit on the charge of assault with intent to commit rape should have been allowed.

The court said, "The contention is without merit, for it is well settled that an indictment for the offense includes all the lesser degrees of the same crime. STATE v. MOORE, 227 NC 236, 42 SE 2d 84; STATE v. GAY, 224 NC 141, 29 SE 2d 458; STATE v. JONES, 222 NC 37, 21 SE 2d 812; STATE v. HIGH, 215 NC 244, 1SE 2d 563; STATE v. WILLIAM, 185 NC 685, 116 SE 736; STATE v. HILL, 181 NC 558, 107 SE 140. And, although all the evidence may point to a commission of a graver crime charged in the bill of indictment, the jury's verdict of an offense of a lesser degree will not be disturbed, since it is favorable to the defendant. N.C.G.S. 15-169; STATE v. BENTLEY, 223 NC 563, 27 SE 2d 738; STATE v. HARVEY, 228 NC 62, 44 SE 2d 472; STATE v. MATTHEWS, 231 NC 617, 58 SE 2d 625." An assault with intent to commit rape is a lesser degree of the felony in the crime of rape, STATE v. BRICKHEAD, 256 NC 494, 124 SE 2d 838; STATE v. GREEN, 246 NC 717, 100 SE 2d 52.

The State of North Carolina respectfully submits that the indictment in the instant case fully and completely charges the crime of rape and that the crime of assault with intent

to commit rape is a lesser degree of the crime of rape and that therefore the indictment contains and does charge the crime of assault with intent to commit rape.

N.C.G.S. 15-169 and 15-170, which the petitioner contends are unconstitutional, but fails to furnish any reason or authority to sustain such belief, allows the jury to acquit the defendant of the capital felony and find him guilty of a lesser degree of that crime, providing elements of such lesser crime are charged in the indictment and supported by the evidence.

Petitioner asks this court to declare North Carolina General Statutes 15-169 and 15-170 unconstitutional. In his petition he cites in support of his contention the case of STATE v. HAUP, 47 F. Supp. 834, but this case does not deal with lesser degrees of crimes but with sufficiency of the indictment, in that it must inform the accused of what he must defend against when his case comes to trial. The petitioner in the instant case cannot conceivably contend that he was not prepared by the State's indictment to defend himself against the crime of which he was found guilty.

Petitioner cites STEROF v. UNITED STATES, 361 US 212, 80 S. Ct. 270, 4 L. ed. 2d 252 in support of his contention that the evidence does not support the verdict of the jury, but he avoids the testimony that the victim testified he held a knife to her throat, S.R., p.p. 8, 9, 10, 12, or that by means of force and threats he had two acts of sexual intercourse with her. S.R., p.p. 10, 11. Additionally, the STEROF case deals with the variance between pleadings and proof and in no way supports his contention that the North Carolina General Statutes are unconstitutional.

The petitioner has drawn unfounded conclusions, including that his constitutional rights were violated, but he avoids pointing to any specific error or instance of the Trial Court or of the Supreme Court of North Carolina that did not insure him a complete and impartial fair trial.

CONCLUSION

It is respectfully submitted that the Respondent has demonstrated:

1—That no Federal question was properly presented by the petitioner either in the Trial Court or upon appeal to the Supreme Court of North Carolina;

2—No Federal question was passed on or reviewed by the Trial Court or the Supreme Court of North Carolina;

3—That the petitioner was not deprived of any constitutional rights guaranteed by the Fourteenth Amendment or the Fifth Amendment of the Constitution of the United States in the trial of his case.

Therefore, the Respondent urges this court to deny this petition for writ of certiorari.

Respectfully submitted,

THOMAS WADE BRUTON
Attorney General

THEODORE C. BROWN, JR.
Staff Attorney

Justice Building
Raleigh, North Carolina

Counsel for the State of
North Carolina, Respondent.